No. 41830-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

KYLE WAGAR,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Christine Pomeroy, Judge
Cause No. 10-1-01404-1

BRIEF OF RESPONDENT

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1. Whether it was error for the prosecutor to ask Wagar on cross-examination the nature of the serious offense for which he had been convicted.

B. STATEMENT OF THE CASE.

The State accepts Wagar's statement of the case.

C. ARGUMENT.

1. It was not error for the prosecutor to ask Wagar the nature of his prior offense, and therefore there was no grounds for mistrial and the court did not err in refusing to grant Wagar's motion for mistrial.

Wagar was charged with and went to trial on one count of first degree unlawful possession of a firearm. [CP 4] On the morning of trial the State moved to amend the information to remove the word "magnum" from the description of the firearm, and the court granted that motion. [RP 21][1] One element of that offense is that the defendant must have been previously convicted of a serious offense. The information alleged that he had previously been convicted of second degree assault and first degree robbery. [CP 4]

When a prior conviction for a serious offense is a necessary element of an offense, a defendant may ask to stipulate that he in

[1] All references to the report of proceedings are from the trial transcript of December 8 and 9, 2010.

fact has such a conviction without naming the specific crime. A trial court may not refuse such a request. State v. Teal, 117 Wn. App. 831, 843-44, 73 P.3d 402 (2003). Wagar made such a request in this case and the trial court read to the jury the agreed stipulation that Wagar had been convicted of a serious offense. [CP 31, RP 128-29] The State did not offer any evidence in its case in chief as to the specific crimes of which Wagar had been convicted.

Wagar took the stand in his defense, and on cross-examination the prosecutor asked him:

> Q. By the way, what was the serious offense that you were convicted of?
>
> A. It was robbery and assault.
>
> Q. Robbery in the first degree, is that correct?
>
> A. Yes, sir.
>
> Q. And assault in the second degree?
>
> A. Yes, sir.
>
> Q. Any other?
>
> A. What's that?
>
> Q. Any others?

[RP 143-44] Defense counsel asked to excuse the jury and made a motion for a mistrial based on the prosecutor's violation of the

stipulation. [RP 144-45] Counsel conceded that the robbery conviction was admissible for impeachment purposes, but argued that the prosecutor had deliberately elicited information about the second degree assault

On appeal, Wagar makes the same argument that the stipulation protected him from any mention of the assault charge. He cites to no authority for his argument that the stipulation applies to anything except the State's case in chief. There his convictions were an element of the offense and he could properly "sanitize" them by stipulating that he had been convicted of a serious offense without naming the offense, or in this case, offenses.

When Wagar took the witness stand, however, he was subject to impeachment and Evidence Rule (ER) 609 controls. That rule provides, in pertinent part:

> Rule 609 (a) General Rule. For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

When a witness testifies, including a criminal defendant, evidence of prior convictions may be offered for the purpose of providing the jury with information to assist in its evaluation of the witness's credibility. Teal, 117 Wn. App. at 844. Because the nature of the prior conviction makes it probative of veracity, "courts should not admit unnamed felonies under ER 609(a)(1) 'unless they can articulate how unnaming the felony still renders it probative.'" Id., (citing to State v. Hardy, 133 Wn.2d 701, 712, 946 P.2d 1175 (1997)).

Crimes of dishonesty are admissible without any weighing or probative versus prejudicial value. ER 609 (a)(2). Wagar does not dispute that his robbery conviction was admissible. Second degree assault is a class B felony punishable by more than one year of imprisonment, RCW 9A.36.021 and 9A.20.021(1)(b), and therefore admissible under ER 609(a)(1) if the court finds it more probative than prejudicial. The court is required to engage in that weighing analysis before admitting evidence of convictions for crimes that are not of dishonesty. State v. Rivers, 129 Wn.2d 697, 705, 921 P.2d 495 (1996).

In this case, the prosecutor asked Wagar, "what was the serious offense that you were convicted of?" Not "offenses", but the singular "offense." All Wagar had to do was reply that he had been convicted of robbery and there would have been no issue. It was not the prosecutor's fault that Wagar blurted out that he had been convicted of assault. He volunteered that information and thus opened the door to further questions about it. State v. Ortega, 134 Wn. App. 617, 626, 142 P.3d 175 (2006) ("A party's introduction of evidence that would be inadmissible if offered by the opposing party 'opens the door' to explanation or contradiction of that evidence.") Because he did so, the court did not have the opportunity to do any probative versus prejudice analysis before the jury heard the evidence. After Wagar moved for mistrial, the court denied the motion, finding that there was not grounds for mistrial. [RP 147] While it failed to do the analysis on the record, the court had to have weighed the probative value versus the prejudice to have reached that conclusion.

While Wagar frames his argument in terms of an erroneous denial of a mistrial, he presupposes that it was reversible error for the jury to hear that he had a conviction for assault. If that was not reversible error, there was no grounds for a mistrial. Here the

court's lack of analysis was harmless error. Failure to make a record of the analysis may constitute an abuse of discretion, Rivers, 129 Wn.2d at 706. Even if the ruling itself had been error, "[a]n erroneous ruling under ER 609(a) is reviewed under the nonconstitutional harmless error standard." Id. An erroneous ER 609 ruling is not reversible error unless a reviewing court finds that if the error had not occurred the outcome of the trial would have been different. Id.

In Wagar's case, the evidence was overwhelming that he was in possession of a firearm. Witnesses watched him for nearly an hour [RP 52] and he rarely removed his right hand from his pocket. [RP 66, 73] Two officers saw him, and he was recorded on video, placing something under a bush, using his right hand. [RP 66] A search of the bush turned up the gun and nothing else. [RP 38] The officers said he told them he had thrown a cigarette, [RP 115] and at trial testified that he had broken and discarded a glass smoking pipe, [RP 139] but neither of those items was located in the bush. [RP 115]

The issue at trial was whether he was in possession of a firearm, not whether he had been convicted of any particular crime. Wagar argues that once the jury heard he had been convicted of

assault they were more likely to convict him of possessing the weapon, but that makes no sense. He does not dispute that the jury could hear of his first degree robbery conviction; first degree robbery is a class A felony. RCW 9A.56.200. While a jury would not likely know the classifications of first degree robbery and second degree assault, presumably the fact that the legislature made robbery a more serious crime than assault reflects the views of society as a whole that robbery is more serious than assault. It is unlikely that a jury would, upon hearing of the assault conviction, be more willing to make the factual finding that Wagar put a gun under the bush rather than a cigarette or a smoking pipe.

The jury was properly instructed in Instruction No. 5a:

> Evidence that the defendant has previously been convicted of a crime is not evidence of the defendant's guilt. Such evidence may be considered by you in deciding what weight or credibility should be given to the testimony of the defendant and for no other purpose.

[CP 42] Jurors are presumed to follow instructions. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

The trial court correctly denied Wagar's motion for a mistrial.

D. CONCLUSION.

Based upon the foregoing argument and authorities, the State respectfully asks this court to affirm the appellant's conviction.

Respectfully submitted this 25th day of October, 2011.

Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Respondent's Brief on the date below as follows:

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 27th day of October, 2011, at Olympia, Washington.

Caroline Jones

THURSTON COUNTY PROSECUTOR

October 28, 2011 - 10:29 AM

Transmittal Letter

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